

UNITED STATES COURT OF APPEALS February 22, 2008
FOR THE TENTH CIRCUIT Elisabeth A. Shumaker
Clerk of Court

In re: HOWARD C. MARQUEZ,

Movant.

No. 08-5011

ORDER

Before **BRISCOE**, **HARTZ**, and **McCONNELL**, Circuit Judges.

Howard C. Marquez, an Oklahoma state prisoner proceeding pro se, moves for authorization to file a second or successive habeas corpus petition pursuant to 28 U.S.C. § 2254. We deny authorization.

Mr. Marquez was convicted of two counts of first-degree murder and sentenced to death. On appeal, the Oklahoma Court of Criminal Appeals (OCCA) reversed. *Marquez v. State*, 890 P.2d 980 (Okla. Crim. App. 1995). On retrial, in 1996, he was again convicted of two counts of first-degree murder, but he was sentenced to consecutive terms of life imprisonment without parole. The OCCA affirmed.

On March 30, 2000, after the Oklahoma state courts denied post-conviction relief, Mr. Marquez filed a petition for habeas corpus relief in federal district court. He asserted that (1) the prosecutor engaged in misconduct by attempting to

define reasonable doubt in closing argument, by denigrating the credibility of two witnesses, and by presenting evidence of other crimes; (2) his sentence should be modified; (3) his trial and appellate counsel were ineffective because they (a) did not object to his identification at trial with a prison photograph; (b) did not argue that he was incompetent to stand trial; (c) did not present exculpatory evidence supporting his alibi; (d) did not challenge the accomplice testimony or request credibility instructions; (e) did not object to the trial court's failure to instruct on lesser-included offenses; (f) failed to perform their duties in a competent manner; and (g) failed to object to the identification instruction; (4) appellate counsel was ineffective for failing to argue that trial counsel was ineffective; and (5) he was denied access to trial court records. The federal district court denied habeas relief, deciding that the OCCA's determination of the first two claims comported with 28 U.S.C. § 2254(d), the ineffective-assistance claims were procedurally barred and would be denied even if they were not procedurally barred, and the denial-of-access-to-records claim was procedurally barred. The district court also denied a certificate of appealability (COA). On appeal, this court dismissed after denying a COA.

In December 2005, Mr. Marquez filed a second state application for post-conviction relief. The OCCA affirmed the district court's denial of relief.

Mr. Marquez asserts eight claims in his motion for authorization to file a second or successive habeas petition. He argues that (1) his trial and appellate

counsel were ineffective because (a) they had a conflict of interest since both were employed by the Oklahoma Indigent Defense System; (b) appellate counsel did not have sufficient time to review the trial record before filing the direct appeal brief; and (c) appellate counsel did not allow him to assist in his own defense. Mr. Marquez also argues that (2) he was denied a fair trial due to judicial misconduct because (a) the judge was confused, inattentive, and had memory lapses as evidenced by the jury qualification and voir dire, the judge's failure to allow an alternate juror, and the judge's taking an unexplained seventy-five minute recess from trial and (b) the judge may have used a penis pump under his robe during trial since he exposed himself and used a pump during three trials in 2003. Additionally, Mr. Marquez argues that (3) the trial judge abused his discretion during voir dire; (4) the jurors were improperly sworn; (5) no alternate juror was seated; (6) there was racial discrimination during jury selection; (7) the jury was improperly instructed; and (8) the jury was not instructed on lesser-included offenses.

Mr. Marquez contends that each of these claims is supported by newly-discovered evidence. To obtain authorization to file a second or successive habeas petition based on newly-discovered evidence, he must make a prima facie showing that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and the new evidence "would be sufficient to establish by clear and convincing evidence that . . . no reasonable

factfinder would have found [him] guilty of the underlying offense.” 28 U.S.C. § 2244(b)(2)(B)(i), (ii).

We conclude that Mr. Marquez has not met these requirements. He has not shown why these claims could not have been discovered previously through the exercise of due diligence. Nor has he shown “a high probability of actual innocence.” *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005). Although the evidence concerning the trial judge’s improper judicial behavior in 2003 is new evidence, Mr. Marquez fails to allege any facts establishing that the judge behaved in a similar manner during his trial. If the judge had misbehaved in this manner, it would have been evident at trial, and Mr. Marquez therefore could have raised the issue previously.

Accordingly, we DENY Mr. Marquez’s motion for authorization to file a second or successive habeas petition. The denial of authorization is not appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari. *See* 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court,

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal line.

ELISABETH A. SHUMAKER, Clerk